

FILED

JUL 27 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GIOVANNI RODRIGUEZ-MARTINEZ,

Defendant - Appellant.

No. 04-10634

D.C. No. CR-04-00028-CKJ

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Submitted July 24, 2006 ^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges

Giovanni Rodriguez-Martinez appeals from his guilty-plea conviction and 37-month sentence for illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a), as enhanced by 8 U.S.C § 1326(b)(2). We dismiss.

Rodriguez-Martinez contends for the first time on appeal that the waiver of appellate rights contained in his plea agreement was rendered invalid by Rule 11

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

defects in his change-of-plea hearing. However, he has failed to demonstrate a reasonable probability that he would not have entered a guilty plea but for any alleged Rule 11 violation, and therefore cannot obtain relief on this basis. *See United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004).

Rodriguez-Martinez also contends that this appeal is not barred because the district court made an ambiguous statement at sentencing suggesting a limited right to appeal on the particular issue of the 12-level sentencing enhancement. However, a district court's oral statements regarding appellate rights can overcome a written appellate waiver only when the court's statements are made contemporaneously with the defendant's plea. *See United States v. Lopez-Armenta*, 400 F.3d 1173, 1177 (9th Cir. 2005). In this case, the district court's statements at the sentencing hearing were made more than a year after Rodriguez-Martinez had entered his guilty plea, and therefore cannot serve as a basis to override an otherwise valid appeal waiver. *See id.*

We dismiss in light of the valid appeal waiver. *See United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000) (stating that an appeal waiver is valid when it is entered into knowingly and voluntarily).

DISMISSED.